

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EVELYN YANIRA NOVOA,)	4:10CV3044
)	
Plaintiff,)	
)	
v.)	MEMORANDUM
)	AND ORDER
NELNET, Inc.,)	
)	
Defendant.)	

Plaintiff filed her Complaint in this matter on March 8, 2010. (Filing No. [1](#).) Plaintiff has previously been given leave to proceed in forma pauperis. (Filing No. [5](#).) The court now conducts an initial review of Plaintiff's claims to determine whether summary dismissal is appropriate under [28 U.S.C. § 1915\(e\)\(2\)](#).

I. SUMMARY OF COMPLAINT

____ Plaintiff filed her Complaint in this matter against her previous employer, Nelnet, Inc. (Filing No. [1](#) at CM/ECF p. 1.) Condensed and summarized, Plaintiff sues Defendant for national origin discrimination under Title VII of the Civil Rights Act of 1964.¹ ([Id.](#) at CM/ECF pp. 7-8.)

Plaintiff alleges that she is a Hispanic female (from El Salvador), and that she worked at Nelnet from December 3, 2007, until her termination on November 25, 2008. ([Id.](#) at CM/ECF p. 7.) As set forth in her charge of discrimination filed with the Nebraska Equal Opportunity Employment Commission ("NEOC"), which

¹Plaintiff's Complaint also mentions sex discrimination, but the only allegation regarding this claim is that a supervisor at Nelnet "treated females in general poorly." ([Id.](#) at CM/ECF p. 7.) This single, vague allegation does not state a sex discrimination claim upon which relief may be granted.

Plaintiff specifically incorporates into her Complaint, Plaintiff alleges that she was repeatedly treated differently than non-Hispanic employees. (*Id.*) In particular, Plaintiff was not permitted to “go home” when she was extremely ill and was not moved to a quieter location to accommodate her hearing problems, although other employees moved. (*Id.* at CM/ECF pp. 7-8.) In addition, Plaintiff is bilingual, but was given “90% English speaking” calls as a customer service representative, which led to complaints about her accent. (*Id.* at CM/ECF p. 7.) Plaintiff’s supervisor also “treated [her] as if [she] was dumb and didn’t understand things” because of her national origin. (*Id.*) Plaintiff alleges that her work performance was satisfactory, and that she received “good scores” on her performance evaluations. (*Id.*) Nelnet terminated Plaintiff on November 25, 2008, for “insubordination,” and Nelnet employees threatened Plaintiff not to speak about her termination. (*Id.* at CM/ECF p. 8.) Plaintiff filed a charge of discrimination and received a right-to-sue letter from the Equal Opportunity Employment Commission (“EEOC”) on February 11, 2010. (*Id.* at CM/ECF p. 9.)

II. APPLICABLE LEGAL STANDARDS ON INITIAL REVIEW

The court is required to review in forma pauperis complaints to determine whether summary dismissal is appropriate. *See* [28 U.S.C. § 1915\(e\)\(2\)](#). The court must dismiss a complaint or any portion thereof that states a frivolous or malicious claim, that fails to state a claim upon which relief may be granted, or that seeks monetary relief from a defendant who is immune from such relief. [28 U.S.C. § 1915\(e\)\(2\)\(B\)](#).

A pro se plaintiff must set forth enough factual allegations to “nudge[] their claims across the line from conceivable to plausible,” or “their complaint must be dismissed” for failing to state a claim upon which relief can be granted. [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544, 569-70 (2007); *see also* [Ashcroft v. Iqbal](#), 129 S. Ct. 1937, 1950 (2009) (“A claim has facial plausibility when the plaintiff pleads factual

content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”). Regardless of whether a plaintiff is represented or is appearing pro se, the plaintiff’s complaint must allege specific facts sufficient to state a claim. *See Martin v. Sargent*, 780 F.2d 1334, 1337 (8th Cir. 1985). However, a pro se plaintiff’s allegations must be construed liberally. *Burke v. North Dakota Dep’t of Corr. & Rehab.*, 294 F.3d 1043, 1043-44 (8th Cir. 2002) (citations omitted).

III. DISCUSSION OF CLAIMS

Liberally construed, Plaintiff’s claims are brought pursuant to Title VII of the Civil Rights Act. Title VII states that it is unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to her compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1).

In order to set forth a prima facie case of discrimination under Title VII, a plaintiff must allege that she 1) is a member of a protected class; 2) was meeting the legitimate expectations of her employer; 3) suffered an adverse employment action; and 4) that circumstances exist which give rise to an inference of discrimination. *See Wheeler v. Aventis Pharm.*, 360 F.3d 853, 857 (8th Cir. 2004). If a plaintiff establishes a prima facie case, then the burden shifts to the employer to produce evidence of a legitimate nondiscriminatory reason for its action. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993). If the employer succeeds in this burden of production, then the burden shifts back to the plaintiff to prove that the employer’s proffered reason was a pretext for intentional discrimination. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143 (2000). The ultimate burden of persuasion remains with the plaintiff throughout the case.

Additionally, prior to filing a suit in federal court under Title VII, a plaintiff is required to exhaust her administrative remedies by first seeking relief through the EEOC or the NEOC. The EEOC/NEOC will then investigate the charge and determine whether to file suit on behalf of the charging party or make a determination of no reasonable cause. If the EEOC/NEOC determines that there is no reasonable cause, the agency will then issue the charging party a right-to-sue notice. [42 U.S.C.A. § 2000e-5\(f\)\(1\)](#); *see also Hanenburg v. Principal Mut. Life Ins. Co.*, 118 F.3d 570 (8th Cir. 1997). The charging party has 90 days from the receipt of the right-to-sue notice to file a civil complaint based on her charge. [42 U.S.C.A. § 2000e-5\(f\)\(1\)](#). The civil complaint may only encompass issues that are reasonably related to the substance of charges timely brought before the EEOC/NEOC. *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 222 (8th Cir. 1994).

Here, Plaintiff alleges that she is Hispanic and that her work performance was satisfactory, having received “good scores” on her performance evaluations. (Filing No. [1](#) at CM/ECF p. 7.) Plaintiff further alleges that she suffered an adverse employment action when she was repeatedly treated differently from white employees with respect to her work conditions, and eventually terminated for objecting to that mistreatment. (*Id.* at CM/ECF pp. 7-8.) The record also shows that Plaintiff exhausted her administrative remedies by presenting her claims to the NEOC/EEOC. (*Id.* at CM/ECF pp. 7-9.) These allegations are sufficient to nudge Plaintiff’s Title VII claims across the line from conceivable to plausible. However, the court cautions Plaintiff that this is only a preliminary determination based on the allegations of the Complaint and is not a determination of the merits of Plaintiff’s claims or potential defenses thereto.

IT IS THEREFORE ORDERED that:

1. Plaintiff’s claims against Defendant may proceed and service is now warranted.

2. To obtain service of process on Defendant, Plaintiff must complete and return the summons forms which the Clerk of the court will provide. The Clerk of the court shall send ONE (1) summons form and ONE (1) USM-285 form to Plaintiff together with a copy of this Memorandum and Order. Plaintiff shall, as soon as possible, complete the forms and send the completed forms back to the Clerk of the court. In the absence of the forms, service of process cannot occur.

3. Upon receipt of the completed forms, the Clerk of the court will sign the summons form, to be forwarded with a copy of the Complaint, to the U.S. Marshal for service of process. The Marshal shall serve the summons and Complaint without payment of costs or fees. Service may be by certified mail pursuant to [Fed. R. Civ. P. 4](#) and Nebraska law in the discretion of the Marshal. The Clerk of the court will copy the Complaint, and Plaintiff does not need to do so.

4. [Fed. R. Civ. Pro. 4](#) requires service of a complaint on a defendant within 120 days of filing the complaint. However, because in this order Plaintiff is informed for the first time of these requirements, Plaintiff is granted, on the court's own motion, an extension of time until 120 days from the date of this order to complete service of process.

5. Plaintiff is hereby notified that failure to obtain service of process on a defendant within 120 days of the date of this order may result in dismissal of this matter without further notice as to such defendant. A defendant has twenty (20) days after receipt of the summons to answer or otherwise respond to a complaint.

6. The Clerk of the Court is directed to set a pro se case management deadline in this case with the following text: **"July 28, 2010: Check for completion of service of summons."**

7. The parties are bound by the Federal Rules of Civil Procedure and by the

Local Rules of this court. Plaintiff shall keep the court informed of her current address at all times while this case is pending. Failure to do so may result in dismissal.

DATED this 2nd day of April, 2010.

BY THE COURT:

s/ Joseph F. Bataillon
Chief United States District Judge

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